No. [redacted] 12

In the Supreme Court of the United States

October Term 194[redacted]

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari, and Brief in Support Thereof.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. .....

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

Comes now Virgil T. Brinegar, hereinafter styled petitioner, and, applying for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, respectfully shows:

A.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in the record (R. ...). The judgment and sentence of the District Court also appears in the record (R. 4).

B.

Jurisdiction.

The decision of the Circuit Court of Appeals, here sought to be reviewed, was originally determined on December 10, 1947. A petition for rehearing was timely filed, and was denied on the 2nd day of January, 1948.

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, Sec. 347(a) U. S. C.

C.

Questions Presented.

1.

Whether a search and seizure, without a search warrant, commenced by Federal Agents without probable cause, can be validated so as to make admissible the evidence thereby obtained, where subsequent to an unlawful pursuit and forcible stopping, but during such illegal search the officers obtain an incriminating admission from the defendant through chance, interrogation, or the force and compulsion inherent in the attending circumstances.

2.

Whether a voluntary statement obtained while Federal Agents are engaged in conducting a search, without a warrant, and without probable cause, in violation of the Fourth Amendment to the Constitution of the United States, is admissible in evidence against the defendant in a subsequent criminal case arising from such illegal search.

D.

Summary Statement of Matter Involved.

1.

On March 5, 1947, an Information was filed in the United States District Court for the Northern District of Oklahoma (Criminal, No. 11,207) charging petitioner, Virgil T. Brinegar, with a violation of the Liquor Enforcement Act of 1936, Title 27, U. S. C., Sec. 223, a misdemeanor (R. 2, 3). On May 5, 1947, petitioner duly filed his motion to suppress the evidence on the ground that it was obtained as a result of an unlawful arrest, and unlawful search and seizure, without a warrant, and in violation of the Fourth Amendment to the Constitution. (R. 2) Upon hearing duly had the court overruled the motion to suppress on May 9, 1947. (R. 2, 3)

Thereupon, on arraignment, petitioner entered his plea of not-guilty, and the cause was tried to a jury, which returned a verdict of guilty as charged, and on May 16, 1947, the court pronounced judgment and sentence of thirty days' imprisonment, and $100.00 fine. (R. 2, 3, 4)

2.

The facts introduced in evidence were briefly the following:

On March 3, 1947, petitioner was driving his 1946 Ford Coupe westerly toward Quapaw, Oklahoma. It was about 6:00 o'clock p. m. and petitioner was returning to his home in Vinita, Oklahoma, from Joplin, Missouri. (R. 31-32) At a point about five miles west of the Missouri line, about a quarter of a mile east of the Quapaw bridge, two Alcohol Tax Unit Investigators, Mr. Malsed and Mr. Creehan, were lying in wait in their car. (R. 8, 11, 17, 19) Their car was facing west, but Creehan "looked through the rear vision

mirror and saw a car rounding the curve about a mile east" of their position. (R. 11) There was nothing untoward in the presence of a car on the highway, nor in the approach of petitioner's car. "As this car passed" both Malsed and Creehan noted that the car appeared to be "heavily loaded"; but there was no testimony whatsoever that the springs were sagging, or that the back end was down, or any similar circumstances (R. 8, 11, 12), and the trial court held that the appearance of the car was not enough to constitute probable cause. (R. 9, 10, 13) Malsed, who had previously arrested Brinegar on September 30, 1946, recognized petitioner when he passed, informed Creehan, "That is Brinegar," and on the sounding of that "charge" the officers immediately gave chase. (R. 8, 11, 22) Petitioner then increased his speed and after a movie-thriller run of about a mile, over rough, curving roads at a speed of sixty miles per hour, the officers opened their siren, crowded petitioner off of the road, into a ditch *and forced him to stop!* (R. 8, 9, 11, 18, 20, 23, 31, 34)

Petitioner first realized that the Federal Agents were trying to stop him when "the siren blowed," and upon such realization he stopped as quickly as he could. (R. 33) He was forced to stop under the most extreme compulsion: driving, so the Federal Agents testified at a speed of up to sixty miles per hour, they drove along side of petitioner's car, "forced him off of the road," into the ditch and prevented his forward progress by bringing their car to a stop at the side of and to the front of petitioner's car, thereby forming a barricade. (R. 9, 11, 20, 23, 24, 31, 34)

Malsed got out of the right side of the investigator's car, and Creehan jumped from the left side and they both started back to petitioner's car. (R. 9, 24, 25) Malsed said,

"Hello Brinegar, how much liquor have you got in the car?" (R. 9, 10, 19) To which Brinegar replied, "Not too much." (R. 7, 9, 10, 19, 20) Simultaneously therewith and while both officers were still approaching petitioner's car, Creehan, who testified that they "make it a point" to get the driver out of his car, so that he can't get away with it, ordered or "requested" Brinegar to get out of his car. (R. 25) Brinegar complied. (R. 20, 31)

With the door of the car thus opened the officers testified they were able to see a case of whisky in the front of the car (R. 9, 20, 24) and subsequent search revealed some twelve or thirteen cases of whisky contained and concealed in a compartment under and back of the seat. (R. 9, 20, 23) The record is clear that prior to the stopping of the car the officers could not see any whisky, and had no personal knowledge that Brinegar was in fact transporting any whisky. (R. 24) According to the officers, petitioner was placed "under arrest" after they searched the car and discovered the whisky. That was fully fifteen minutes or more after they had originally stopped the car. According to Officer Malsed the "formal arrest" was then made by advising petitioner that, "We are taking you in." (R. 9, 21, 22) Creehan was of the opinion that no formal arrest was ever made; petitioner being merely advised, "Well, you get in the car, come along with us." (R. 23, 24) Brinegar, the car and the whisky were all taken into custody on the spot. (R. 21, 23)

The Federal Investigators admittedly had no warrant for the arrest of petitioner, had no search warrant for the search and seizure, and, of course, served no warrant upon petitioner. (R. 7, 10, 11)

3.

An appeal was duly taken from the decision of the District Court to the Circuit Court of Appeals for the Tenth Circuit and there docketed as Case No. 3518.

The opinion and judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on the 2nd day of January, 1948. This application for writ of certiorari is timely filed.

4.

On the appeal the United States Circuit Court of Appeals for the Tenth Circuit, (PHILLIPS, HUXMAN and MURRAH, Circuit Judges sitting) affirmed the trial court in a 2 to 1 decision. The majority of the court, in an opinion by PHILLIPS, J., held:

> First: That the facts within the knowledge of the investigators prior to the time the incriminating statements were made, were not sufficient as basis for and *did not constitute probable cause for a search.*
>
> Second: That said facts were *insufficient* to constitute the basis for or provide probable cause for the arrest of petitioner without a warrant.
>
> Third: That under the circumstances disclosed by the record, the statements made by petitioner were not coerced by the action of the officers, but were voluntarily made.
>
> Fourth: That the search was commenced and made *after* the pursuit, the interrogation and the admissions made.
>
> Fifth: That notwithstanding the absence of probable cause for search at the inception of pursuit, the subsequent voluntary admission of petitioner, made after being unlawfully stopped and interrogated with respect to whisky, *could relate back and be added to*

the insufficient information previously had by the investigators so as to constitute probable cause for the search and seizure.

Sixth: That a voluntary admission and evidence obtained while officers were engaged in conducting a search without probable cause, is admissible in evidence.

In an incisive and well-reasoned dissenting opinion HUXMAN, J., lays it down:

First: There was *clearly no probable cause* warranting the search, the seizure or the arrest of petitioner without a warrant.

Second: That the search began and was continuing from the commencement of the pursuit of petitioner by the Federal Officers. That the pursuit was undertaken solely for the purpose of searching petitioner's car and with the express intent of consummating such search.

Third: That the acts of the officers in pursuing the car, forcing it to the side of the road, compelling it to stop and interrogating the driver *constituted a search.*

Fourth: That the admission upon which the Government relies was obtained while the Federal Agents were engaged in an illegal search of petitioner's car.

Fifth: That an admission against interest or other evidence obtained while Federal Agents are engaged in conducting an illegal search, in violation of the Fourth Amendment, is inadmissible in evidence.

E.

Reasons Relied on for Allowance of the Writ.

First. The opinion of the Tenth Circuit Court of Appeals in this case is in direct conflict with the opinions of

this court in *Carroll* v. *United States*, 267 U. S. 28, 45 S. Ct. 280, 29 L. ed. 543, 39 A. L. R. 790; *Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; and *United States of America* v. *Michael Di Re*, 16 L. W. 4071, decided January 5, 1948. The opinion is also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Ray* v. *United States*, 84 F. (2d) 655.

That in its opinion the Tenth Circuit Court of Appeals has decided a question involving the constitutional rights, privileges and immunities of petitioner under the Constitution of the United States in a way probably in conflict with applicable decisions of this court; it has, by its opinion, announced a rule of law which tends to abrogate and nullify the rights, privileges and immunities of this petitioner under the Fourth and Fifth Amendments to the Constitution. It has sanctioned a course of conduct on the part of Federal Officers, which invades and denies the basic civil liberties of the citizen, so as to call for an exercise of this court's power of supervision.

Second. The opinion of the Tenth Circuit Court of Appeals in this case is in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Nueslein* v. *District of Columbia*, 115 F. (2d) 690; and the opinion of the Circuit Court of Appeals for the Fifth Circuit in the case of *Moring* v. *United States*, 40 F. (2d) 267. [See also the decision in the case of *United States* v. *Hanley*, 50 F. (2d) 465 (D. C. N. Y.)]

The opinion of the Tenth Circuit Court of Appeals in this case has decided an important question of Federal constitutional law in a manner in conflict with decisions of other Circuit Courts of Appeals on the same matter, which constitutional question has not been, but because of its extreme

importance to all citizens of these United States, and to the Government should be settled by a decision of this court.

The Circuit Court of Appeals opinion lays down an intolerable rule which authorizes Federal Alcohol Tax Unit Agents, arbitrarily, without warrant or judicial authorization, without justification or probable cause, to pursue and forcibly stop at random any citizen using the public highways, upon the chance of discovering in his vehicle, liquor, to be used as evidence against him, and to furnish the basis for a criminal prosecution. Such a rule is contrary to the many decisions of this court and the decisions of other Circuit Courts of Appeals. If given credence and followed generally by other Circuit Courts of Appeals it will effectively undermine public confidence in all law enforcement and destroy in large measure the guarantees against unreasonable searches and seizures provided for by the Fourth Amendment to the Constitution.

The majority opinion further determines a problem of grave and general importance under the Fifth Amendment to the Constitution. Its holding is directly contrary to the opinion of Mr. Justice Vinson in the case of *Nueslein* v. *District of Columbia*, 115 F. (2d) 690, holding that voluntary statements obtained while officers are engaged in conducting a search in violation of the Fourth Amendment, under the Federal Rule, are inadmissible. We believe that this decision of the court below is probably in conflict with the opinion of this court. This is a matter of fundamental constitutional law which deserves pronouncement by this court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, the full proceedings in this case, Numbered 3518, *Virgil T. Brinegar, Appellant,* v. *United States of America, Appellee,* and that said judgment of the Tenth Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper; and your petitioner will ever pray.

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Petitioner,

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. .....

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI**.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Tenth Circuit has not yet been officially reported. It appears in the transcript of the record of the Circuit Court of Appeals proceedings.

*Subsequent to the delivery of this Brief in Support of Writ to the printer, on this 20th day of January, 1948, counsel were privileged to review the recent opinion of this court in *United States of America* v. *Michael Di Re*, decided on January 5, 1948, and reported in 16 L. W. 4071. (The case is not yet officially reported.) Due to limitation of time for the filing of this application we are unable to fully discuss this case, as it relates to the opinion of the Circuit Court of Appeals. We believe the decision to be here applicable and *that it requires the reversal* of the opinion of the lower court. As to the Oklahoma law of arrest, please see: 22 Okla. Stats. Ann., Sec. 186 ("Arrest is the taking of a person into custody, that he may be held to answer for a public offense."); 22 Okla. Stats. Ann., Sec. 190 ("An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."); and the cases of *Hoppes* v. *State*, 105 P. (2d) 433, and *Evans* v. *State*, 110 P. (2d) 621. We submit that Brinegar was under arrest at the time the officers stopped him. The question was properly raised and determined contrary to our contentions as will be seen from the opinion of the court below. We respectfully submit that both as to the question of "arrest" and of "search and seizure" the opinion of the Circuit Court of Appeals is directly contrary to the *Di Re* decision.

II.

Jurisdiction.

1. The writ of certiorari is applied for under Rule 38 of this court and jurisdiction is invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, U. S. C., Sec. 347(a), and is the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583.

2. The opinion of the Circuit Court of Appeals for the Tenth Circuit was filed on December 10, 1947. Petition for rehearing was duly filed and denied January 2, 1948. The opinion of the court was entered the same day.

III.

Statement of the Case.

A full statement of the case has been given under "A" in the petition for writ of certiorari, *supra*, and in the interest of brevity, is not here repeated.

IV.

Specification of Errors.

(a)

First. The Circuit Court of Appeals erred in holding that a search and seizure, without a search warrant, commenced by Federal Agents without probable cause, can be validated so as to make admissible the evidence thereby obtained, where subsequent to an unlawful pursuit and forcible stopping, but during such illegal search the officers obtain an incriminating admission from the defendant through chance, interrogation or the force and compulsion inherent in the attending circumstances.

(b)

Second. The Circuit Court of Appeals erred in hold-

ing that a voluntary statement obtained while Federal Agents are engaged in conducting a search, without a warrant, and without probable cause, in violation of the Fourth Amendment to the Constitution of the United States is admissible in evidence against the defendant in a subsequent criminal case arising from such illegal search.

(c)

Third. The Circuit Court of Appeals erred in permitting the Federal Alcohol Tax Unit Agents, arbitrarily, without warrant, without justification and without probable cause, to pursue and forcibly stop, at random, any citizen upon the public highways, and to subject the citizen to such inconvenience and indignity, upon the chance of discovering in his vehicle, liquor, to be used as evidence against him, and to furnish the basis for a criminal prosecution.

V.

ARGUMENT.

(1)

Fundamental to the American concept of "Democracy" are the rights and immunities of the citizen proclaimed by the Bill of Rights. Of these, the security guaranteed to all American citizens by the Fourth and Fifth Amendments —freedom from fear of oppression—is basic to the enjoyment of liberty. These Amendments have been termed "the bulwark of our Constitution." Their origin and purposes have been the subject of great inspiration and fundamental teachings by both this court and the several Circuit Courts of Appeals:

Amos v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654;

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319;

Weeks v. *United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652;

Adams v. *New York*, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575;

Boyd v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746;

Nueslein v. *District of Columbia*, 115 F. (2d) 690 (C. C. A., D. C.).

Ever since the *Boyd* case, it has been the unquestioned policy of this court to hold paramount the safeguarding of constitutional rights as against effecting punishment of all misdemeanants! As Mr. Justice VINSON so aptly stated:

> "To us the interest of privacy safeguarded by the amendment is more important than the interest of punishing all those guilty of misdemeanors."
>
> —*Nueslein* v. *District of Columbia, supra.*

Until the opinion of the Tenth Circuit Court of Appeals in this case was handed down we had thought that as a matter of "hornbook" law it was imperative that a search and seizure without warrant be made upon "probable cause" then existing or it was unreasonable within the meaning of the constitutional interdiction and unlawfully made. *Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790; *Pearson* v. *United States*, (C. C. A. 10) 150 F. (2d) 219; *United States* v. *One 1937 Model Studebaker Sedan*, (C. C. A. 10) 96 F. (2d) 104.

Neither had we any question but that in establishing "probable cause"—that is, the circumstances necessary to lead a reasonably discreet and prudent man to believe that liquor is illegally being transported in the automobile to be

searched—*the officer was limited to the knowledge with which he initiated the search;* that he *could not* sustain the search upon the basis of the discovery of that which he seeks in an otherwise illegal search. The vindication of his suspicion, the cases taught, will not suffice; the discovery of the contraband proves that his suspicion was well founded, but does not in any manner retroactively validate or justify the illegal search. *Amos* v. *United States,* 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; *Byars* v. *United States,* 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520; *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790; *Wisniewski* v. *United States,* (C. C. A. 6) 47 F. (2d) 825; *Pearson* v. *United States,* (C. C. A. 10) 150 F. (2d) 219; *United States* v. *O'Connell,* (D. C. N. Y.) 43 F. (2d) 1005; *Nueslein* v. *District of Columbia, supra; Henderson* v. *United States,* (C. C. A. 4) 12 F. (2d) 528.[1]

Nor did we believe there was any question but that if the search without a warrant was commenced without probable cause in violation of the Fourth Amendment, the admissions or evidence procured thereby could not be introduced as evidence against the defendant. *Gouled* v. *United States,* 255 U. S. 298, 65 L. ed. 647, 41 S. Ct. 261; *Amos* v. *United States,* 255 U. S. 313, 65 L. ed. 654, 41 S. Ct. 266; *Nueslein* v. *District of Columbia,* (C. C. A. D. C.) 115 F. (2d) 690; *United States* v. *Hanley;* (D. C. N. Y.) 50 F. (2d) 465; *Moring* v. *United States,* (C. C. A. 5) 40 F. (2d) 267; *United States* v. *Setaro,* (D. C. Conn.) 37 F. (2d) 134; *In re Oryell,* (D. C. N. Y.) 28 F. (2d) 639.

1. "The courts have not yet gone so far as to sustain the search of automobiles on mere suspicion that they are being used for the unlawful transportation of liquor. *If such right should be upheld, it would subject our citizens to a reign of terror.* It is important that the rule itself should be steadfast and strictly adhered to for the protection of the great rank and file of the law-abiding citizens of the country." (Italics ours.) *United States* v. *O'Connell, supra.*

(2)

In the interest of brevity we shall not repeat the facts; they are fully set out in the application for writ of certiorari, *supra*.[2] We respectfully refer the court to the summary of the facts in the dissenting opinion. (See footnote 4.)

If the majority opinion is permitted to stand, we respectfully submit, that the law is thrown into a state of utter confusion. It is impossible to reconcile the opinion of the Circuit Court of Appeals with the prior decisions of this court and the various Circuit Courts of Appeals. It is a startling and a dangerous departure from precedent, which, for all practical purposes, abrogates and nullifies the protection of the Fourth and Fifth Amendments as to all citizens driving upon the public highways.

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2. The majority opinion baldly misstates the record: "In response to further questioning, Brinegar stated there were about 12 cases of whiskey in the coupe. *Brinegar further stated that he had both a wholesale and a retail liquor dealer's stamp and asked if that would help him.* The officers *then* searched the car. * * *"

It is respectfully submitted that under our theory of the law the nature of the admission is immaterial, as *no* admission can retroactively supply the failure of probable cause and *no* admission obtained in the course of an illegal search in violation of the Fourth Amendment is admissible in evidence. However, we respectfully submit that the record *does not* sustain this finding. Brinegar was arrested and the search made on March 8, 1947. The statement by Brinegar relative to possession of liquor dealer's stamps was made admittedly after the search, after he had been placed under arrest, after he was taken to Miami, Oklahoma, and there incarcerated; the statement was made on the following day, March 4, 1947, while he was being taken from Miami, Oklahoma, to Tulsa, "On the way down from Miami he told me that he had a wholesale and retail liquor dealer's stamp." (R. 27, 21) We further believe the record to be replete that "their search began when they commenced the pursuit." Such was the position of the Government, both in the trial court and before the Circuit Court of Appeals. (R. 9, 11, 20, 23, 24, 25, 26, 31, 32; and statement by Government's Attorney, R. pp. 12 and 18: "That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant." per Huxman, J.) Such an erroneous statement of fact by the majority, it is submitted, necessarily precludes the application of the law decisive of the issue here involved. *In re Fried*, (C. C. A. 2) 161 F (2d) 453, 462. Although this misstatement of fact was called to the court's attention on petition for rehearing the court refused even to correct it.

We submit that the holding and decision is in direct conflict with the rule laid down by this court in the leading case of *Carroll* v. *United States*, 267 U. S. 28, 45 S. Ct. 280, 29 L. ed. 543, 39 A. L. R. 790.

Under the Circuit Court of Appeals opinion Federal Agents may now pursue and forcibly stop, for the purpose of search, whomsoever they may please, *indiscriminately, at random and without probable cause,* and if through ignorance, chance, skillful interrogation or through the force and compulsion inherent in the attending circumstances the officers are able to obtain sufficient incriminating admissions they then have legitimatized their illegal enterprise, admittedly undertaken in affront to the law, and have clothed it with the sanctity of "probable cause"—thereby not only validating the search but making admissible in evidence against the defendant, both the statements and the evidence so obtained.

This court, on the contrary, has *consistently* held that a search and seizure without warrant must be made upon probable cause existing at the inception of the search or it is unreasonable within the meaning of the Fourth Amendment to the Constitution. The cases do not admit of any "retroactive effect" of after-acquired knowledge or information which may be added to admittedly insufficient knowledge so as to supply probable cause, which was necessary to the original pursuit and forcible stoppage. To affirm such a rule is to make meaningless the rule of "probable cause." If the constitutional guarantee is to have any meaning it must be held that in establishing "probable cause" *the officer is necessarily limited to the knowledge with which he initiates the search and that it may not be established upon the basis of subsequently discovered infor-*

mation by way of admission, or the discovery of contraband itself.[3]

In the *Carroll* case, Chief Justice TAFT, speaking for this court, lays down the test:

> "* * * we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search * * * those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known to a competent official authorized to search, probable cause for believing* that their vehicles are carrying contraband or illegal merchandise.
>
> . . . . . .
>
> "*The measure of legality* of such a seizure is, therefore, that the seizing officer *shall have reasonable or probable cause for believing that the automobile which he stops and seizes had contraband liquor therein which is being illegally transported.*" (Italics ours.)

(4)

The factual situation here involved is obvious! Notwithstanding the opinion of the Circuit Court of Appeals to the contrary, we respectfully submit that when the officers started out to "stop" Brinegar they had but one purpose and one intent in mind: to search that car! The search began when they commenced pursuit and the force, compulsion and coercion attending the surrounding circumstances was continuing throughout. We adopt the sum-

3. *Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A.L.R. 790; *Nueslein* v. *District of Columbia*, 115 F. (2d) 690, and cases cited under Argument (1), *supra*.

mary of HUXMAN, J.[4] The opinion of this court in *Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654, and the opinion of the Fifth Circuit Court of Appeals in *Ray* v. *United States*, 84 F. (2d) 654, are here applicable.[5]

(5)

Additionally, this amazing opinion holds that: *The search* was not commenced until after the pursuit was had, the defendant's car was run into the ditch and forcibly stopped, the interrogatories were propounded, the admissions obtained, and *then* or at some time thereafter the search was commenced.[6] That notwithstanding the absence of probable cause for search at the inception of the chase, the subsequent "voluntary admission" of Brinegar, made after being unlawfully stopped and interrogated, related back and was added to the insufficient information pre-

4. "By the admission of the agents-themselves, they did not pursue this car for the purpose of arresting Brinegar. Their testimony makes that very clear. They had no warrant for his arrest. They did not see him commit an act of law violation which would have warranted them in arresting him without a warrant. * * * What for then did they pursue him down the road with their siren screeching and crowd him off the highway, place him under restraint, and make it impossible for him to proceed. There can only be one answer—to ascertain whether he had whisky. *Ascertaining this constituted a search.* Is there anyone so naive as to believe that if he had answered that he had no whisky that they would have apologized, begged his pardon for having violated his constitutional rights as well as their oath of office to respect the Constitution, and permitted him to proceed? That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant. In other words, they intended to search this car, and *the search was on when the chase began* and Brinegar was crowded off the road and prevented from going his lawful way as far as the Alcohol Tax Unit agents were concerned."

5. See also: *United States* v. *Baldocci*, (D. C., S. D. Cal.) 42 F. (2d) 567; *Duncan* v. *Commonwealth*, 198 Ky. 841, 250 S. W. 101; *State* v. *Lindway*, 131 Ohio St. 166, 2 N. E. (2d) 490; *United States* v. *Hoffenberg*, (D. C. N. Y.) 24 F. Supp. 989. Cf. *Hoppes* v. *State*, (Okla. Cr.) 105 P. (2d) 433; *Evans* v. *State*, (Okla. Cr.) 110 P. (2d) 621, and *Henderson* v. *United States*, (C. C. A. 4) 12 F. (2d) 548.

6. See Footnote 2, *supra*.

viously had by the Federal Investigators, so as to supply probable cause for the search and seizure. Having thus allowed the Investigators by their illegal action to "pull themselves up by their own bootstraps," the search is by the court legitimatized. It further holds that the admission and evidence secured by such search (clearly without probable cause at its inception) is admissible in evidence against a defendant.

We respectfully submit, it is impossible to reconcile this opinion with the decision of the Circuit Court of Appeals for the District of Columbia in *Nueslein* v. *District of Columbia*, 115 F. (2d) 690, the decision in *United States* v. *Hanley*, 50 F. (2d) 465. (See also the decision of the Fifth Circuit Court of Appeals in *Moring* v. *United States*, 40 F. (2d) 267).

"The facts in this case are indistinguishable in principle from those in these cases."[7] We shall not burden this brief with a review of the facts in the *Nueslein* and *Hanley* cases. In both cases the court held that the search involved commenced when the officers began their pursuit! There is no real question in this record that here the officers *were* illegally investigating when they gave chase, pursued the car with siren screaming forced it over to the side of the road, compelled it to stop, interrogated the driver and simultaneously therewith ordered him to get out of his car. Under the authority of the *Nueslein* and *Hanley* cases *these acts constituted a search.*

The *Nueslein* opinion, it is respectfully submitted, flatly holds that the evidence thus obtained through a *voluntary* declaration of fact is inadmissible in evidence as against

7. Huxman, J., dissenting. See also *United States* v. *Setaro*, (D. C., Conn.) 37 F. (2d) 134. Cf. *Henderson* v. *United States*, 12 F. (2d) 528.

defendant in a criminal prosecution.[8] It would be a work of supererogation and extreme vanity to here attempt to cover the authorities, the historical background, the determinations of policy and the scope of the Fourth and Fifth Amendments in more excellent, or scholarly fashion than has already been done by Mr. Justice VINSON in that opinion. In our opinion Justice VINSON in the *Nueslein* case had declared basic and fundamental constitutional policy. That policy underwrites and makes *vital* the basic philosophy of American Democracy. It not only merits the greatest weight and consideration by this court—its persuasiveness and basic right demand that it be pronounced by this court as fundamental policy.

(6)

We believe that it is fitting that the writ be here granted because this case presents to the court an issue of general and national importance. It deals with the most

8. As the *sole* authority for its conclusion to the contrary the opinion of the Circuit Court of Appeals cites it own decision in *Morgan* v. *United States*, 159 F. (2d) 85. By *a fortiori* reasoning, of course, if this decision is wrongly decided and the *Morgan* case is to the same effect, then the *Morgan* case is also erroneously determined. However, we respectfully point out to this court that the *Morgan* case is no authority. The point here involved was neither presented to nor determined by the court in that case. The opinion on its face discloses that the judgment of the lower court was there reversed *solely* on the ground that the motion for directed verdict as to Count 2 should have been sustained. The jury had acquitted appellant of the charge under Count 1. Under well established rules of construction, that part of the opinion relating to "arrest," not being determinative nor necessary to the actual holding or decision *is dicta*. Additionally we call the court's attention to the fact that the opinion in the *Morgan* case was written for the court by Judge Huxman. Certainly he is in position to state the matter then before the court and which was by the *Morgan* opinion determined. In his well reasoned dissent in this case Judge Huxman says:

> "The facts in the *Morgan* case are not nearly as strong on the question of pursuit as they are in this case. But in any event, *this precise point was not raised or decided in that case.* * * * The *Morgan* case is not authority for the proposition that a voluntary admission, obtained while officers were engaged in a search in violation of the Fourth Amendment, is admissible." (Emphasis ours.)

fundamental constitutional rights, privileges and immunities, the preservation of which it has repeatedly been held, is the highest function of the judiciary. Its importance and its implications reach far beyond the confines of this case. It is the resolve of a basic conflict: Shall we exact "a pound of flesh" even at the expense of the violation of a constitutional freedom or shall the policy of our Government be that we shall retain inviolate and living the constitutional guarantees of the American citizen at the expense of allowing a misdemeanant to escape punishment.

That is the basic issue which Mr. Justice Vinson resolves in the *Nueslein* case:

> "We feel that the policy of making effective in concrete cases, 'The right of the people * * against unreasonable searches and seizures, * * *' to be the more important."

It is that which Judge Huxman so ably states in his dissenting opinion in this case:

> "Of course, officers should not be unduly restricted in their efforts to enforce the law, but in no instance are they warranted in violating constitutional immunities in their effort to enforce the law. Having taken an oath to uphold the law, they should respect the rights of citizens guaranteed thereunder and should not, in their zeal, violate such rights. There is no conduct more unwarranted or offensive than to have an officer, who has taken an oath to uphold the law, pursue a citizen down the road, force him to the ditch, and interrogate him, all without probable cause, in the hope that he may obtain an admission ordinarily admissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment."

The type of conduct approved by the opinion of the Circuit Court of Appeals, if followed, gives rise to the estab-

lishment of an American gestapo. It is a reincarnation and legalization of those practices which originally gave rise to the demand for these constitutional safeguards. The soil of Europe today cries out with the blood of free men sacrificed upon an altar erected out of the degradation of the basic rights we here seek to maintain.

Movements subversive to constitutional government do not suddenly appear—they are usually rooted to the slow, but steady and deadly denial of the rights of individuals. The upheaval of civil disorder is adumbrated years before by separate but continual violations of constitutional "guards."

We respectfully suggest that Americans have a feeling of abhorrence and repulsion regarding tactics of law enforcement which the opinion below approves and encourages. It is contrary to fundamental concepts of decent "fair play" and justice. *In re Fried,* (C. C. A. 2) 161 F. (2d) 453. We do not admit of the necessity of permitting an officer of the law to violate a constitutional safeguard in order to enforce a statute.[9] Nor do we believe that illegal acts of an officer should be "purged" of that illegality by the sacrifice of the constitutional rights of the citizen. The occasional detection of a misdemeanor certainly affords little justifica-

9. If petitioner was guilty he was guilty of a misdemeanor. He was not a felon. Petitioner had never before been convicted of any crime. He was transporting U. S. tax-paid liquor allegedly from Missouri into Oklahoma. He was lawfully upon the public highway. By the admission of the officers they did not see defendant commit any act of law violation which would have warranted them in arresting him without a warrant. Under the holding of the lower court itself they saw no violation of law and had no knowledge sufficient to constitute probable cause for their original pursuit. This certainly was not an "important" crime. There was no great public policy involved either in the transgression or in the enforcement. "Men of distinction" in some 45 of our American States were at the same time lawfully transporting tax-paid whisky. The law which was violated is not of real import—*it is no longer law today!* (The Liquor Enforcement Act of 1936 (Title 27, U. S. C., Sec. 223), under which this prosecution was had became inoperative as to Oklahoma by repeal of the Oklahoma "Permit Law" (37 O. S. A., Secs. 41-48, incl.) through enactment of Enrolled House Bill No. 254, effective April 24, 1947. There is present-

tion for lawlessness on the part of Federal officers sworn to uphold the Constitution.

We feel that the illegality basic to the original pursuit is "rottenness" which has penetrated to the very core. It is our feeling, and we respectfully submit, the feeling of this court, that all such methods of crime detection are unwholesome, un-American, and unnecessary "dirty business" which tend slowly, but surely, to the steady denial of the constitutional rights of the individual.[10]

We respectfully join with Judge HUXMAN in subscribing to the philosophy of the *Nueslein* case[11] and urge upon this court to declare it as the Federal rule! Its adoption *demands* the reversal of the opinion of the Circuit Court of Appeals.

We respectfully submit that this court should issue the writ prayed for.

Respectfully submitted,

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ly no Federal law prohibiting the transportation of tax-paid whisky into the State of Oklahoma. *Von Patzoll* v. *United States*, (C. C. A. 10) 163 F. (2d) 216, certiorari denied.)). The same Government agency which seeks so strongly to convict by any means grants full authority, with its blessing, today to transport such liquor from Missouri to Oklahoma. The defendant here received a fine of $100.00 and a sentence of 30 days. The inflicting of this punishment upon petitioner will serve as no deterrent to others and will uphold no existing law.

10. See, Mr. Justice Holmes, dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 470 (1927).

11. "I subscribe fully to the philosophy of the *Nueslein* case. The personal guarantees of the Constitution are sacred rights. They are the things for which men have died through the centuries. * * * Whenever a violation of one of these rights is involved, all reasonable presumptions should be resolved against one charged with a violation thereof and the burden should be placed upon him to bring his conduct clearly within the constitutional power."